

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BENSLEY CONSTRUCTION, INC.,
on its own behalf and on behalf
of all others similarly situated,

Plaintiff,

v.

Civil Action No. 05-11249-GAO

MARSH & MCLENNAN COMPANIES, INC.,
MARSH, INC., ACE USA, ACE INA, AMERICAN
INTERNATIONAL GROUP, AMERICAN RE-
INSURANCE COMPANY, ARTHUR J.
GALLAGHER & CO., HILB ROGAL & HOBBS,
COMPANY, WILLIS GROUP HOLDINGS, LTD.,
WILLIS NORTH AMERICA, INC., WILLIS
GROUP LTD., UNIVERSAL LIFE RESOURCES,
INC. (d/b/a ULR INSURANCE SERVICES, INC.),
THE CHUBB CORPORATION, USI HOLDINGS,
INC., METLIFE, INC. PRUDENTIAL
FINANCIAL, INC., UNUMPROVIDENT
CORPORATION, THE ST. PAUL TRAVELERS
COMPANIES, INC. ZURICH AMERICAN
INSURANCE COMPANY, LIBERTY MUTUAL
GROUP, INC., LIBERTY MUTUAL INSURANCE
COMPANY, LIBERTY MUTUAL FIRE
INSURANCE COMPANY, EMPLOYERS
INSURANCE COMPANY OF WAUSAU and ST.
JAMES INSURANCE COMPANY LTD.,

Defendants.

**MOTION TO DISMISS OF DEFENDANT
LIBERTY MUTUAL GROUP, INC.**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Liberty Mutual Group, Inc. ("Liberty Mutual Group") hereby moves to dismiss the claims asserted by plaintiff Bensley Construction, Inc. ("Bensley") on its own behalf and on

behalf of all others similarly situated, for failure to state a claim against Liberty Mutual Group. As its reasons therefor, and as explained in detail in the accompanying memorandum of law, Liberty Mutual Group states:

The First Amended Complaint alleges that Liberty Mutual group, among others, is either a broker of insurance products or an insurance carrier.

Liberty Mutual Group is a holding company that does not issue any insurance policies.

There is no basis for Bensley's claims against Liberty Group for recovery for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty because Liberty Mutual Group is not an insurer. Further, even if it was an insurer, Liberty Mutual Group would owe no duty to Plaintiff, as an alleged insured, as a matter of law.

There is no basis for Bensley's claim against Liberty Mutual Group for unjust enrichment because that is a theory of recovery that exists only when a contract exists and is not performed fully.

There is no basis for Bensley's claim against Liberty Mutual Group for breach of contract and breach of the covenant of good faith and fair dealing because Bensley fails to allege that Liberty Mutual Group and plaintiffs are parties to any contract, let alone one that was breached and caused damages to plaintiff. In the absence of a contract, Bensley's claims for breach of contract and breach of the covenant of good faith and fair dealing, which does not arise absent a contract, must fail.

WHEREFORE, Liberty respectfully requests that the Court dismiss all claims asserted by plaintiff against Liberty Mutual Group pursuant to Fed.R.Civ.P 12(b)(6).

Respectfully submitted,

LIBERTY MUTUAL GROUP, INC.

By its attorneys,

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Dated: July 8, 2005

LOCAL RULE 7.1 CERTIFICATION

I hereby certify that we have conferred with counsel for plaintiff by telephone on July 8, 2005, and the parties were unable to resolve the issues presented in this motion.

RALPH T. LEPORE
Ralph T. Lepore, III

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party on the attached service list by first class mail on July 8, 2005.

RALPH T. LEPORE
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